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No. 604

In the Supreme Court of the United States

OCTOBER TERM, 1968

VAN A. STILLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the Court of Claims (Pet. App. A) is not reported. The order of the United States District Court for the District of Columbia dismissing petitioner's complaint in a prior, related action (Pet. App. B) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1968 (Pet. App. A). Petitioner's motion for reconsideration was denied on July 17, 1968. The petition for a writ of certiorari was filed on October 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether petitioner's action for back pay was barred, under the doctrine of *res judicata*, by a final judgment of a district court dismissing his prior suit for reinstatement.

2. Whether the procedures by which petitioner was discharged as a probationary employee were in accordance with applicable Civil Service regulations.

STATEMENT

On June 12, 1964, petitioner, a probationary employee of the Internal Revenue Service, was notified in writing of his proposed separation from the Service for having falsified his appointment documents, in violation of Section 1942.55 of the Rules of Conduct for Internal Revenue Service Employees.[1] The specification of charges stated that petitioner had answered negatively the following two questions in an employment questionnaire (G. Ex. 1, p. 4):

> Have you ever had either a nervous condition, nervous breakdown, or mental illness?
>
> Have you ever been treated, hospitalized or advised that you were treated for either a nervous, mental, or psychiatric condition?

The specification stated that petitioner's answers were contradicted by a medical report, dated December 19,

[1] Section 1942.55 (Pet. 2–3) provides in pertinent part: "An employee may be subjected to severe disciplinary action and prosecution for intentionally making false or misleading verbal or written statements in matters of official interest. Some of these matters of official interest are: * * * forms which serve as a basis for appointment * * *."

1951, of the Board of Medical Survey, U.S. Naval Hospital, San Diego, California (*ibid.*; see G. Ex. 3):

> [This report] discloses that you were hospitalized on October 17, 1951 for a psychiatric condition. You were retained at the hospital from that time until January 22, 1952 at which time you were discharged from the Naval Service since you were found to be unsuitable for continued service. Upon your admission to the hospital, you repeatedly requested that you be given psychiatric treatment in order "to overcome this terrible dilemma I'm in." The report further indicates that you had been informed of the findings of the Board of Medical Survey. The report also reveals that while under treatment at the hospital, you stated that you had a similar episode approximately one year prior to your enlistment in the Navy. At that time while in college you had found yourself to be depressed and irritable with ideas of suicide.

On June 13, the day after he was notified of the proposed separation, petitioner wrote a letter to the District Director (G. Ex. 1, pp. 6–8) in which he admitted that he had been hospitalized and discharged from the Navy for unsuitability as stated in the specification of charges. He claimed that he had been overworked while serving aboard an aircraft carrier in port in San Diego, as a result of which, he "became exhausted and depressed and could not sleep, and sought medical advice. Since there was no psychiatrist on board, I was then transferred from the ship to the Naval Hospital, at my own request, for examination and whatever disposition might be indicated. At the hospital I was examined and placed under observa-

tion, but not treated in any way. * * * After a few days of adequate sleep and rest I was perfectly well, and was told by the physician in charge of my case that in his opinion I could be returned to shipboard duty, where my depression could recur, but that if I chose he would recommend my honorable discharge from the service for unsuitability. * * *"

In the letter petitioner admitted that he should have answered affirmatively the question whether he had ever been hospitalized for a mental or psychiatric condition. He explained that through an "exercise of poor judgment" he thought a negative answer would be "more correct" because he was under the impression that he was never actually "treated, but merely observed." Petitioner claimed that he had not intended "to conceal information or mislead" and that he had explained the circumstances of his discharge from the Navy during an interview with IRS supervisors prior to his appointment. Although petitioner's letter stated that he had been unaware of the Navy medical report, he did not request an opportunity to examine it.

On June 23, the District Director advised petitioner in writing that he had considered petitioner's response and concluded that the charge had not been refuted and that it warranted his separation (*id.* at 9). The letter notified petitioner that his separation was to take effect on June 26 and that he had a right to appeal to the Civil Service Commission if he believed that his separation had not been effected in accordance with the regulations.

On June 28 petitioner appealed to the New York Regional Director of the Civil Service Commission and requested a hearing (*id. at* 1–2). Petitioner's letter did not allege any failure to comply with the regulations. He contended only that his separation was arbitrary and unjust, relying on the explanation he had previously given to the IRS District Director.

The CSC Regional Director denied petitioner's appeal on July 10 (*id.* at 11–12). His letter advised petitioner that the Commission does not have authority to review the sufficiency of the reasons for separation of a probationary employee nor does it grant a hearing on the employee's appeal.[2] The Regional Director stated that the Commission's review is limited to whether the agency complied with the procedures set out in 5. C.F.R. 315.805,[3] and that a careful review of

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[2] 5 C.F.R. 752.103(a)(5) excludes probationary employees from the provisions of 5 C.F.R. Part 772, relating to procedures on appeal before the Civil Service Commission. See 5 C.F.R. 772.301(a).

[3] 5 C.F.R. 315.805 (Pet. 3–4) provides that if a probationer's employment is to be terminated for conditions arising before his appointment he is entitled (1) to receive advance written notice "stating the reasons, specifically and in detail, for the proposed action"; (2) to answer the charges and to have the answer considered by the agency; and (3) to receive written notice of the agency's decision.

5 C.F.R. 315.806 details the probationer's appeal rights to the Commission:

> (a) *Right of appeal.* An employee is entitled to appeal to the Commission in writing from the agency's decision to terminate him under § 315.804 [for unsatisfactory performance or conduct] or § 315.805 [for conditions arising before appointment—applicable here] only as provided in this section. The Commission's review does not include any mat-

the record showed that those procedures had been followed:

On July 16, petitioner took a further appeal to the Commission's Board of Appeals and Review, again contending only that his separation was unjustified in the light of his reply to the specification of charges (*id.* at 13–16). Petitioner obtained a copy of the Navy medical report on July 27, but it does not appear that the medical report had been forwarded to the Commission by the IRS. Although petitioner's appeal was still pending, he made no attempt to challenge any statement in the report as inaccurate, nor did he submit the report to the Commission. On August 14, the Board of Appeals and Review affirmed the Regional Director's decision for the reasons which he had stated (*id.* at 20–21).

On November 19, 1964, petitioner filed a complaint in the United States District Court for the District of Columbia seeking reinstatement on the ground that his separation was arbitrary and capricious in that it was not supported by the evidence (*Stilley* v. *Cohen*, Civ. No. 2867–64, D.D.C.). Petitioner subsequently amended his complaint to allege that his separation was procedurally defective in that the IRS failed "to give reasons for the action specifically and in detail." The government moved to dismiss the complaint, or

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ter except as provided in paragraphs (b) [discrimination—inapplicable here] and (c) of this section.

* * * * *

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

in the alternative, for summary judgment, on the grounds that petitioner could not obtain judicial review of the merits of his separation and that his challenge to the procedural regularity of his separation was barred because he had not presented it on appeal to the Civil Service Commission. On December 17, 1965, the district court, after consideration of the administrative record and the arguments of counsel, dismissed the complaint on the grounds that "(1) * * * the reason for [petitioner's] discharge is reasonable on its face and sufficiently precise as a matter of law"; (2) petitioner was barred from raising the alleged procedural irregularity "which was not raised before the Civil Service Commission, and which in any event is insubstantial"; and (3) the court lacked jurisdiction "to conduct judicial review beyond these two points" (Pet. App. B). On May 27, 1966, the court of appeals affirmed without opinion (Pet. 6), and no petition for a writ of certiorari was filed.

On December 14, 1966, petitioner initiated the present action for back pay in the Court of Claims, contending that his discharge was arbitrary and that the procedural requirements of the regulations had not been followed. The Court of Claims, although stating that summary judgment would have been inappropriate if petitioner had brought his suit initially in that court, granted the government's motion for summary judgment on the ground that petitioner's suit was barred by the adverse judgment of the district court in his prior action for reinstatement (Pet. App. A):

> On consideration of the record before [the district court and the court of appeals], the arguments presented to them, and their orders, we conclude that all the material issues which plaintiff seeks to raise in the present suit have already been determined in the prior action and therefore that plaintiff's claim in this court is barred by collateral estoppel.

ARGUMENT

1. Petitioner's suit for back pay in the Court of Claims rested upon the same cause of action—the alleged illegality of his separation—as his suit for reinstatement in the district court. Contrary to petitioner's contention (Pet. 7), the district court did not refuse to reach the merits of his claim for reinstatement. Its dismissal of the complaint was an adjudication on the merits, based on the court's findings that the grounds for the discharge were reasonable and precise and that the alleged procedural defects were barred under the doctrine of exhaustion of administrative remedies and, in all events, were without merit. The district court correctly held that the scope of judicial review was limited to those issues, see *Keim* v. *United States,* 177 U.S. 290; *Eberlein* v. *United States,* 257 U.S. 82; *Seebach* v. *Cullen,* 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972; *Baum* v. *Zuckert,* 342 F. 2d 145 (C.A. 6); cf. *Eustace* v. *Day,* 314 F. 2d 247 (C.A.D.C.), and since the Court of Claims and the district courts have concurrent jurisdiction in civilian back-pay cases (28 U.S.C. 1346 (a)), the same principles of judicial review apply in Court of Claims actions. In the circumstances of

this case, the Court of Claims properly held that petitioner was barred from relitigating issues which had been decided against him by the district court or which could have been raised in the earlier proceeding.

2. Although we believe that the basis of the Court of Claims' decision was correct in view of the posture of this case, petitioner's reliance on *Bennett* v. *United States,* 356 F. 2d 525 (Ct. Cl.), vacated and remanded, 385 U.S. 4, makes it appropriate to point out the material distinctions between the two cases. The petitioner in *Bennett,* a probationary civilian employee of the Navy, was given notice of her proposed separation on the ground that she had failed to disclose, on her security questionnaire, that she had been a member of the International Workers Order; the notice gave the dates of alleged membership, her membership number, and the number of the local (Pet. App. C, p. 13). Mrs. Bennett denied that she had ever been a member of that organization, but the Navy held that her denial did not contradict the information which it had obtained and discharged her. The Court of Claims dismissed her suit for back pay over the dissent of Judge Davis, who believed that, in view of the security implications of the discharge, the Navy had failed to comply with its own regulations in that the employee was not given sufficient information to afford her an opportunity to rebut the charges against her (*id.* at 16, 19–20). In response to the petition for a writ of certiorari, the Solicitor General stated that "the additional documentary evidence upon which the charge was actually based should have been made

available to petitioner in order to remove any doubt as to her ability to meet the charges against her with more specificity than the submission of a general denial," and suggested that the judgment of the Court of Claims should be vacated and the cause remanded (*id.* at 18)— a course which this Court followed.

The specification of charges in the present case, on the other hand, was far more detailed, and satisfied the requirement that a probationary employee must be advised "specifically and in detail" of the reasons for the proposed action (5 C.F.R. 315.805). It stated the dates, place, and cause of petitioner's hospitalization; the fact that petitioner had consequently been discharged as unsuitable for military service; and statements which petitioner had made during his hospitalization. Petitioner's lengthy reply dispels any notion that he was unfamiliar with the basis of the charge. Moreover in *Bennett,* the plaintiff had denied the critical fact in issue—whether she had been a member of the organization—and the additional information was vital to enable her to refute in detail the charge against her. Petitioner, on the other hand, admitted that he had been hospitalized for a condition that required the services of a psychiatrist and that he had been discharged from the Navy because of an emotional problem. His only defense to the charge was that his failure to disclose those facts, which he admitted was an error, was not intentionally false or misleading because he believed that the questionnaire did not call for such information.

Petitioner was charged with violating a regulation designed to ensure that the Internal Revenue Service

may confidently rely on the trustworthiness of its employees in the performance of their sensitive duties. Petitioner's response to the charge showed that he elected not to reveal facts which would have been material to the decision to employ him. Disclosure of the Navy medical report to petitioner would not have enabled him to refute the fact, which he admitted, that he had intentionally omitted all reference to his hospitalization on his appointment questionnaire. Presumably petitioner would have attempted, as he did during subsequent stages of the litigation, to contradict certain statements in the specification of charges. But even if petitioner's version of his hospitalization were accepted, the Internal Revenue Service was entitled to find that petitioner's concealment of material facts because of a hypertechnical interpretation of the questionnaire did not satisfy the standards which its employees must maintain.[4]

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[4] Similarly, the failure to forward the medical report to the Civil Service Commission did not affect petitioner's rights. As noted above (pp. 5–6 & n. 3, *supra*), the Commission's review is limited to whether the agency followed the required procedures. Whether petitioner was given sufficiently detailed notice of the charge is to be determined from the notice and specification. The Commission correctly held that the regulation had been complied with, and petitioner did not allege that he was prejudiced by the failure to disclose the report to him. Since the Commission did not have jurisdiction to review the merits of petitioner's separation, examination of the contents of the report would not have been pertinent to the Commission's inquiry.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1968.

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